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CITATIONS

494-015—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1607

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE BOEING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a–33a)[2] is reported at 459 F. 2d 1143. The decision and order of the National Labor Relations Board (Pet. App. 34a–46a) are reported at 185 NLRB No. 23.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–3a) was entered on March 14, 1972. The petition

[1] This brief will discuss only the issue in No. 71-1607, and the Board will file a separate brief as respondent in No. 71-1417, which has been consolidated with this case.

[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 71-1417. "A." refers to the separate appendix to the briefs.

for a writ of certiorari was filed on June 9, 1972, and was granted on December 18, 1972 (A. 205–206). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> **Sec. 7.** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> * * * * *
>
> Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

QUESTION PRESENTED

Whether the National Labor Relations Board, in deciding whether a union violates Section 8(b)(1)(A) of the Act by assessing and seeking judicial enforcement of a fine against a union member for breach of a

union rule against strikebreaking, is required to determine whether the fine is reasonable in amount.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 16, 1965, the day after the expiration of a collective bargaining agreement between the Union[3] and the Company,[4] the Union struck and picketed the Company's Michoud, Louisiana plant in furtherance of demands for a new contract (Pet. App. 35a; A. 57). During the 18 days that the strike continued, 143 of the 1900 production and maintenance employees represented by the Union at Michoud crossed the picket line and went to work (Pet. App. 35a; A. 98, 197–199). All of the 143 employees had been members of the Union prior to the strike; 61 resigned before crossing the picket line, 58 resigned after they went back to work, and 24 did not resign. (Pet. App. 35a–36a; A. 10, 82–85, 159–162, 177–186.) The Union's constitution and bylaws contained no provisions expressly permitting or limiting voluntary resignations from the Union (Pet. App. 40a, n. 11; A. 11, 111, 118).

The strike ended on October 4, 1965, following ratification of a new contract by the Union membership (Pet. App. 35a; A. 57). The Union thereupon notified all employees who had crossed the picket line, including those who had resigned their Union membership, that charges were being brought against

[3] Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO.

[4] The Boeing Company.

them under the Union constitution. The constitution provided for the imposition of a fine or other discipline against a member for "[a]ccepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission." (Pet. App. 36a; A. 80, 116, 129, 143, 163.)

Fines were imposed on all the employees who had gone to work during the strike, regardless of whether, or when, they had resigned from the Union. Employees who did not appear for trial before the Union trial committee, and those who appeared and were found to have violated the constitutional prohibition, were fined $450 and barred from holding Union office for up to five years. (Pet. App. 36a; A. 81–82, 57–58, 62, 67, 72, 88, 115, 119, 165, 169–172.) Early in 1966, the membership voted to reduce, to 50 per cent of their earnings during the strike, the fines of returning strikers who appeared for trial, apologized, and pledged loyalty to the Union.[5] On this basis, the fines of 35 of the employees were reduced (Pet. App. 36a; A. 119–122, 164, 173–174).

In an attempt to enforce the fines, the Union sent letters to the employees stating that collections were being turned over to an attorney, that legal action would be taken to collect the fines, and that the reduced fines would be returned to $450 if they were not paid. (Pet. App. 37a; A. 58, 72, 81–82, 166–168). The Union also filed civil suits against several em-

[5] Employees who worked during the strike earned between $95 and $145 per 40-hour week (Pet. App. 37a).

ployees to collect the fines, plus attorney's fees and interest (Pet. App. 37a; A. 76, 82, 133–135, 175–176). At the time of the Board hearing, none of the $450 fines and only a few of the reduced fines had been paid (Pet. App. 37a; A. 122, 81–82, 173–174), and all of the suits were still pending (Pet. App. 37a).

B. THE BOARD'S DECISION AND ORDER

Upon a charge filed by the Company, the Board held that the Union violated Section 8(b)(1)(A) of the Act by fining those employees who had resigned from the Union before returning to work during the strike, and by fining those who had resigned after returning to work to the extent that such fines were based on post-resignation work (Pet. App. 37a–42a). But, relying on *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Board held that the fines imposed on those employees who had not resigned from the Union, and those imposed on resignees for working while they were still members, did not violate the Act (Pet. App. 42a–43a).

The Board declined to consider whether the latter fines nonetheless violated Section 8(b)(1)(A) because they were unreasonable in amount, holding that "the legality of union fines does not depend on their reasonableness" (Pet. App. 42a, n. 16). In so ruling, the Board followed its decision in *Int'l Ass'n of Machinists, Local Lodge No. 504 (Arrow Development Co.)*, 185 NLRB No. 22 (Pet. App. 47a–58a).[6] The Board

[6] Reversed *sub nom. David O'Reilly* v. *National Labor Relations Board*, 82 LRRM 2073 (C.A. 9); see also *Morton Salt Co.* v. *National Labor Relations Board*, 82 LRRM 2066 (C.A. 9).

there concluded that effectuation of Congress' intention that the Board not intrude into internal union affairs required that Section 8(b)(1)(A)'s prohibitions be construed as "extend[ing] to union discipline imposed for certain prohibited purposes, but not [to] the severity of otherwise lawful discipline" (Pet. App. 55a); the latter issue, the Board held, is for the courts to determine in suits to collect the fines (*ibid.*).

The Board ordered the Union to cease and desist from imposing fines on employees who had resigned from the Union for their post-resignation conduct in working during the strike, and from seeking court enforcement of such fines. It further ordered the Union to reimburse any employees who paid fines for a pro-rata share reflecting the amount of their post-resignation work activity. (Pet. App. 43a–44a.)

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by fining (1) employees who had resigned from the union prior to returning to work and (2) employees who resigned after returning to work for work done after resigning (Pet. App. 16a–22a). The court, however, rejected the Board's conclusion that the reasonableness of the fines had no effect on their legality under the Act, holding that, at least when court action is used or threatened to compel compliance (Pet. App. 23a, n. 26), "the imposition of an unreasonably excessive disciplinary fine is violative of Section 8(b)(1)(A)" (Pet. App. 25a). The court therefore remanded the case to the Board to consider the reasonableness

of the fines imposed on employees who did not resign or who were fined for pre-resignation work (Pet. App. 33a).

SUMMARY OF ARGUMENT

In *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, this Court held that a union does not violate Section 8(b)(1)(A) of the Act by fining those of its members who went to work during a lawful strike, and by seeking judicial enforcement of those fines. In so concluding, the Court emphasized that the legislative history of Section 8(b)(1)(A) indicates that it was not intended that the Board would review internal union affairs. Subsequent cases have reaffirmed this position, invalidating only union actions pursuant to rules which are inconsistent with policies of the federal labor laws.

The union action here in fining its members for working during a strike implemented a rule of a type which was specifically found to be consistent with national policy in *Allis-Chalmers*. Insofar as the fines related to work by union members, therefore, they did not violate Section 8(b)(1)(A), regardless of the amount of the fine involved, and the Board thus has no power to review the size of the fine. References in decisions of this Court to the right of unions to impose "reasonable fines" should not be read as holding that the Board must determine whether fines imposed are reasonable, since that issue has not previously been before this Court. There is no basis for reading into the Act a provision which would require the Board to review the judgment of the union on its

purely internal affairs. The courts are a better forum than the Board in which to balance the rights of individual union members against the needs of the union as a whole.

ARGUMENT

SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT REQUIRE THE BOARD TO DETERMINE WHETHER A JUDICIALLY ENFORCEABLE UNION FINE IMPOSED ON A MEMBER FOR BREACH OF A VALID UNION RULE IS REASONABLE IN AMOUNT

Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7, *i.e.*, the right to engage in concerted activities and to refrain from doing so. A proviso to Section 8(b)(1)(A) preserves the right of a union "to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

In *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, this Court held that a union did not violate Section 8(b)(1)(A) of the Act by fining its members who went to work during a lawful strike, and by seeking judicial enforcement of those fines.[7] In so concluding, the Court noted that the legislative history of Section 8(b)(1)(A) and its proviso shows that "Congress did not propose any limitations

[7] On December 18, 1972, the Court denied the Company's petition for certiorari in the present case, which sought reconsideration of *Allis-Chalmers. The Boeing Co.* v. *National Labor Relations Board*, No. 71-1563.

with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195. This interpretation of Section 8(b)(1)(A), the Court added, is reinforced by the Landrum-Griffin Act of 1959.[8]

Subsequent decisions have qualified *Allis-Chalmers* to this extent: if the union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *National Labor Relations Board,* 394 U.S. 423, 429.[9] Thus, in *National Labor Relations Board* v. *Marine Workers,* 391 U.S. 418, the Court ruled that a union violated Section 8(b)(1)(A) by expelling a member for filing an unfair labor practice charge against the union with the Board without first exhausting internal union remedies, as required by union rule. The Court held that the rule in question was contrary to an important

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[8] In that Act, "Congress expressly recognized that a union member may be 'fined, suspended, expelled, or otherwise disciplined,' and enacted only procedural requirements to be observed. * * * 29 U.S.C. § 411(a)(5)." *Allis-Chalmers, supra,* 388 U.S. at 194. (The Board does not deny that the Union observed those requirements in this case (A. 80, 118–119).) Before Landrum-Griffin, this Court noted in *Machinists* v. *Gonzales,* 356 U.S. 617, 620, that the protection of union members from the arbitrary conduct of union officers had not been undertaken by federal law, and indeed had been expressly denied. See *Allis-Chalmers, supra,* 388 U.S. at 193, n. 33.

[9] Where there is no impingement on such policy, however, "the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield, supra,* 394 U.S. at 426, n. 3.

policy of the Act, *i.e.*, that employees have unrestrained opportunity to complain to the Board. 391 U.S. at 424.

Similarly, in *National Labor Relations Board* v. *Granite State Joint Board,* No. 71–711, decided December 7, 1972, this Court held that the union action was inconsistent with the national policy, expressed in Section 7 of the Act, that employees may refrain from union activity. In that case, the union had fined former members for returning to work during a strike after they had lawfully resigned from the union.[10]

1. Insofar as the fines here were imposed on employees who worked during the strike without resigning at all from the Union, or, in the case of employees who resigned, were based on work done before the resignations became effective, they do not impinge on any policy of the federal labor law. The fines were in furtherance of a union rule against working during a strike, a rule which, this Court held in *Allis-Chalmers,* served a legitimate union interest and was compatible with the policies of the National Labor Relations Act. Moreover, they were imposed for working while the employees were members of the Union and thus obligated by the contract of membership to abide by legiti-

[10] As we shall show in our brief in No. 71–1417 (see n. 1, *supra*), we believe that the holding in *Granite State* requires that the decision of the court below be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by fining employees for work done after resigning from the Union.

mate union rules. In these circumstances, the fines do not violate Section 8(b)(1)(A).[11]

The court below, in concluding that *Allis-Chalmers* and *Scoffield* indicate that the Board is required to determine the reasonableness of fines assessed by unions against their members for violations of legitimate union rules, ignored the rationale upon which those decisions were based. Instead, the court focused on references to "reasonable fines" in the opinions in concluding that this Court has already determined that the question of reasonableness is for the Board, rather than the courts, to determine. However, in neither *Allis Chalmers* nor *Scofield* did this Court have occasion to decide that question, since in both cases, the fines levied by the union were conceded to be reasonable in amount (see 388 U.S. at 192–193, n. 30; 394 U.S. at 426 and 430).

[11] The court below concluded that the size of the fine alone might constitute a violation of 8(b)(1)(A) on the theory that an inordinately large fine may be viewed as a union reprisal for the employee's exercise of a "statutorily protected right" (Pet. App. 29a), or as affecting his employment status as much as an illegally obtained employment suspension (Pet. App. 30a). Judge Browning, dissenting in *Morton Salt Co.* v. *National Labor Relations Board*, 82 LRRM 2066, 2072–2073 (C.A. 9), answers both contentions. He points out, first, that the precise holding of *Allis-Chalmers* is that union member employees have no "statutorily protected right" to work during a strike in violation of a union rule. Further, the imposition of a fine, of whatever size, has in itself no effect upon the employee's employment status; there would be such an effect only if the employer were induced to aid in the collection of the fine by suspending or discharging the employee for nonpayment. Otherwise, the existence of the fine, no matter what its size, is unrelated to the employment status of the individual.

Accordingly, the use of the term "reasonable fines" in those opinions probably reflects no more than an accurate statement of the facts there involved, or, at most, a reservation of the question of whether the imposition of "unreasonable" fines would violate Section 8(b)(1)(A).[12] *Allis Chalmers* and *Scofield* do furnish a guide to how that question should be decided, but that guidance is to be found, not in the Court's observations that the fines in the cases then before it were reasonable, but by the application of the principle upon which those cases were decided—that

[12] "Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine." *Allis-Chalmers*, *supra*, 388 U.S. at 183. "There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even were there evidence that Congress shared this concern, this would not justify reading the Act also to bar court enforcement of reasonable fines." *Id.* at 192–193 (footnotes omitted). "A union rule [was held in *Allis-Chalmers* to be] * * * enforceable against voluntary union members by expulsion or a reasonable fine." *Scofield*, *supra*, 394 U.S. at 428. "We affirm, holding that the union rule is valid and that its enforcement by reasonable fines does not constitute the restraint or coercion proscribed by § 8(b)(1)(A)." *Id.* at 436.

In *Scofield*, the Court also stated (394 U.S. at 430):

"* * * § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is *reasonably enforced* aginst union members who are free to leave the union and escape the rule." [Emphasis added.]

However, the phrase "reasonably enforced," when read in context, has reference, not to the severity of the discipline, but to the manner of its enforcement—that is, whether it is enforced by violence or actions affecting the employees' employment status on the one hand, or by union expulsion or judicial action on the other.

Congress gave the Board only a very limited role in the review of internal union discipline (see *supra,* pp. 8–10). Under that rationale, the imposition of an unreasonably high union fine is not an unfair labor practice. The Board thus correctly ruled that it is not required to determine whether a fine is unreasonably high in amount in order to decide whether the union has committed an unfair labor practice under Section 8(b)(1)(A).[13]

2. The instant case highlights the practical effect of ignoring the Congressional direction, emphasized in *Allis-Chalmers* and *Scofield,* that the Board is not to concern itself with purely internal union affairs. If the Board is to determine whether a fine is improper solely because of its size, it must, as the court below noted, consider "[s]uch factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the

[13] The Board's conclusion is entitled to great deference, since it represents a consistent and contemporaneous construction of the statute by the agency charged with the responsibility for its interpretation. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434; *Udall* v. *Tallman*, 380 U.S. 1, 16. Since Section 8(b)(1)(A) and its proviso were enacted in 1947, it has been the Board's consistent position that it has "not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee." *Local 283, United Automobile Workers (Scofield)*, 145 NLRB 1097, 1104, affirmed, 394 U.S. 423; see also, *Int'l Typographical Union*, 86 NLRB 951, 957, affirmed, 193 F. 2d 782, 800–801 (C.A. 7); *Minneapolis Star and Tribune Co.*, 109 NLRB 727.

detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, [and] the availability of other less harsh union remedies * * *" (Pet. App. 29a). These factors call for a weighing of the justification advanced by the individual member who returned to work against the impact of the strikebreaking on the other employees who remained on strike, and also for an assessment of how much punishment is necessary to redress the injury to the latter and to deter similar defections in the future. Making these judgments is the essence of union self-government. Furthermore, the task requires careful scrutiny of the facts of each case, since any general rule might be unresponsive to the realities of the particular situation.[14]

This kind of determination would necessarily require the Board to make a searching inquiry into the union's internal affairs. Moreover, it would require the Board either to repudiate the principle of exhaustion of internal union remedies and thus destroy a bulwark of union self-government,[15] or to consider

[14] For this reason, we submit that the court below was unrealistic in concluding (Pet. App. 27a) that the Board's assumption of this task would lead to the development of uniform national standards for determining the reasonableness of fines. Cf. *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 296. Any generally applicable standard would have to take into account so many variables that its utility as a guide to action would be minimal.

[15] "[C]ourts and agencies will frustrate an important purpose of the 1959 [Landrum-Griffin] legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Re-

the sufficiency of such reasons as may be urged to excuse the failure to exhaust and thereby more deeply involve itself in internal union affairs. In view of the Congressional intent to keep the Board out of the area of internal union administration, it is hardly likely that Congress would have conferred upon the Board by implication, and without guidelines,[16] the task of assessing the reasonableness of the fine which the union has imposed upon a member for breach of a valid union rule.

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sponsible union self-government demands, among other prerequisites, a fair opportunity to function." *National Labor Relations Board* v. *Marine Workers*, *supra*, 391 U.S. at 429, concurring opinion of Harlan, J. (Exhaustion was not required in *Marine Workers* because there, unlike here, the union rule sought to be enforced was contrary to the policies of the Act (*supra*, pp. 9–10).)

The court below flatly rejected an exhaustion requirement concerning the reasonableness issue because it "would not, in our opinion, best serve the interests of justice or further the objectives of the N.L.R.A." (Pet. App. 23a, n. 27). However, there is no reason to consider a resort to internal union procedures futile or unduly burdensome. For instance, here the Union reduced the fines of those members who appeared before the trial committee, apologized, and pledged loyalty to the Union (Pet. App. 36a; A. 119–122, 130–131). In making this reduction, the Union also took into account the fact that, prior to the strike, many of the employees were unable to go to work because of a hurricane (A. 121, 123).

[16] Compare Section 8(b)(5) of the Act, 29 U.S.C. 158(b)(5), where Congress expressly empowered the Board to determine whether the fees, required to be paid to the union under a union-security provision, are "excessive or discriminatory under all the circumstances." This section provides that, in making such a finding, "the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

3. The conclusion that the Board has no authority to review the size of the fines imposed does not mean that the matter is left to the uncontrolled discretion of the union. The courts, for some time, have been reviewing union disciplinary measures, including the reasonableness of union fines.[17] Such questions raise issues more appropriate for judicial than specialized agency review.[18]

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[17] The "state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship.'" *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, *supra*, 388 U.S. at 193, n. 32, quoting from Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1078 (1951).

See, *e.g.*, *McCauley* v. *Federation of Musicians*, 26 LRRM 2304 (Pa. Ct. Com. Pl.) ($300 fine deemed excessive and reduced to $100); *Farnum* v. *Kurtz*, 70 LRRM 2035 (Los. Ang. Cal. Mun. Ct.) ($592 fine deemed unreasonably large and reduced to $100); *North Jersey Guild, Local 173* v. *Rakos*, 110 N.J. Super. 77, 264 A. 2d 453 (N.J. Super. Ct., App. Div.), petition for certification denied, 56 N.J. 478, 267 A. 2d 60 ($500 fine enforced as reasonable "'in view of the nature of the offenses [crossing sister local's picket line] * * * the manner in which defendant profited from them and * * * in view of [the] current economic conditions'" (264 A. 2d at 461); *Walsh* v. *Communications Workers, Local 2336*, 259 Md. 608, 271 A. 2d 148 (Md. Ct. App.) ($500 fine against member who earned $400 while working during strike not excessive); *International Union, U.A.W., Local 283* v. *Scofield*, 76 LRRM 2433 (Wisc. Sup. Ct.) ($100 fine considered reasonable in the absence of "compelling reasons to the contrary"); *L.A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct., App. Dept.) ("reasonableness" of fine a triable issue in suit for collection).

[18] Cf. *Int'l Bro. of Boilermakers* v. *Hardeman*, 401 U.S. 233, 238–239: "The fairness of an internal union disciplinary proceeding is hardly a question beyond 'the conventional experience of judges,' nor can it be said to raise issues 'within the special competence' of the NLRB."

The court below found support for its conclusion that the determination of the appropriateness of the size of the fines was for the Board in its belief that the Board's procedures would be more easily available to union members than litigation through the courts. However, if the union chooses to seek judicial enforcement of the fines, the member will be forced to defend in court regardless of the availability of the Board as a forum. In any event, this factor is hardly sufficient to overcome the clear evidence that Congress intended to limit the Board's participation in internal union affairs.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it requires the Board to assess the reasonableness of otherwise lawful union fines in determining their legality under Section 8(b)(1)(A).

Respectfully submitted.

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